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THE INDIANA TRUST CODE—WHEN TRUST AND CODE CONFLICT

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The Indiana Trust Code, which became effective on September 2, 1971, is a compilation of trust law from numerous sources.¹ It applies only to express personal trusts.² The Code recodifies, either without change or with minor changes, many statutes affecting trusts and trust administration which were previously dispersed throughout the laws concerning probate,³ fiduciaries⁴ and real property.⁵ Certain provisions of the Code are similar to statutes governing such areas as insurance⁶ and banking.⁷ In addition, the Code adopted provisions of the Uniform Trustees' Powers Act which have not heretofore been enacted in Indiana.⁸

Instead of dealing merely with statutory law, the Code also codified, expressly overruled or clarified much of the existing Indiana case law relating to trusts. The Code relied heavily upon the Restatement (Second) of Trusts, though in a few provisions the Code expressly

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1. The history of the Trust Code and of the Indiana Trust Code Study Commission was detailed in an article by Anthony E. Ard, Executive Secretary of the Commission. Ard, *A Proposed Trust Code for Indiana—An Effort at Reform*, 45 NOTRE DAME LAW. 427 (1970) [hereinafter cited as Ard]. The article highlights certain significant changes made in the trust law of Indiana by the Trust Code and sets forth the principles or themes which guided the commission's deliberations. *Id.* at 428, 433.

2. Pub. L. No. 416, ch. 1, § 1, [1971] Ind. Acts 1911; IND. ANN. STAT. § 31-1301 (Supp. 1971). Commission comment (c): "The rules of law in this code apply only to personal trusts. Personal trusts include those which may be created for either private or charitable purposes."

3. IND. CODE tit. 29 (1971); IND. ANN. STAT. tits. 6-8 (1953).

4. IND. CODE tit. 30 (1971); IND. ANN. STAT. tit. 31 (1969). This title included the Revised Uniform Principal and Income Act originally enacted in Indiana in 1969. IND. CODE ch. 30-2-3 (1971); IND. ANN. STAT. § 31-1101 to -1114 (1969).

5. IND. CODE tit. 32 (1971); IND. ANN. STAT. tit. 56 (1961).

6. IND. CODE § 27-1-12-16 (1971); IND. ANN. STAT. § 39-4210(b) (1965) (life insurance trusts).

7. IND. CODE §§ 28-1-5-8, -11-13, -12-1, -2-6-1 (1971); IND. ANN. STAT. §§ 18-508, -1113, -1201, -1213 (1964). These sections include those providing for the holding of securities in the name of a nominee and the voting of shares by proxy, a provision that a bank cannot be compelled to act as trustee and one establishing a bank's right to compensation as a trustee.

8. See, e.g., Pub. L. No. 416, ch. 3, § 3(a), [1971] Ind. Acts 1919; IND. ANN. STAT. § 31-1503(a) (Supp. 1971).

9. See comment to Pub. L. No. 416, ch. 2, § 7(c), [1971] Ind. Acts 1916; IND. ANN. STAT. § 31-1407(c) (Supp. 1971). Since the Code relies heavily on the Restate-

differs from the Restatement.⁹ Moreover, the authors of the Code included practices, procedures and customs that had arisen in the administration of trusts.¹⁰

Because of the comprehensive nature of the Code, it is conceivable that it could have governed completely the creation and administration of all express personal trusts. Nevertheless, two guiding themes which persisted throughout the Commission's labors in drafting the Code negate such an application. The drafters resolved that the settlor should have the right to provide the rules for governing his trust¹¹ and that the disposition of trust property, which is primarily family wealth, should remain a private affair.¹² The first of these central principles was codified by the following provision:

The rules of law contained in this article [the Code] shall be interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust. If the rules of law and terms of the trust conflict, the terms of the trust shall control *unless* the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize.¹³

While there are many areas of interest in the new Code, this article will concentrate generally on the effect of the foregoing provision of the Code and in particular on the problem of when the "unless" clause in the second sentence is controlling. Therefore, this discussion will attempt to delineate which terms of a trust will prevail over contrary Code provisions (which are, of course, the "rules of law" mentioned in the quoted section). This task is unfortunately complicated by the fact that many of the "rules of law" in the Code impose duties or liabilities on the trustee rather than explicitly restricting the terms of the trust. Nor is the Commission comment to the section under consideration particularly helpful.¹⁴ In fact, it adds another dimension to the question with its

ment, it should be recognized that the Restatement does not purport to give the law as it should be but rather as the majority of jurisdictions have held it. Only in situations in which there is no majority rule does the Restatement include a rule or principle of trust law which its editors think ought to be adopted. See I A. SCOTT, *THE LAW OF TRUSTS* xii (3d ed. 1967) [hereinafter cited as Scott].

10. Ard, *supra* note 1, at 432.

11. *Id.* at 434.

12. *Id.* at 440.

13. Pub. L. No. 416, ch. 1, § 3, [1971] Ind. Acts 1912; IND. ANN. STAT. § 31-1303 (Supp. 1971) (emphasis added).

14. As an aid in interpreting its provisions, the Code provides:

The report of the Trust Code Commission made according to IC 1971, 2-5-11 may be consulted by the courts to determine the reasons, purpose and policies of this article, and may be used as a guide to its construction and application.

reference to trust terms which may be "against public policy."

THE PRELIMINARY STATUTORY CONSTRUCTION PROBLEM

Many sections of the Code are prefaced by the clause, "unless the terms of the trust provide otherwise," or words of similar import. These sections include those governing areas of trust administration where the courts have consistently upheld the right of the settlor to establish rules in contravention of common law rules. These areas of administration include the powers, duties and liabilities of the trustee¹⁵ and allocation or apportionment between income and principal.¹⁶ The clause also appears in a few procedural sections covering matters such as venue, court docketing of the trust and bond for the trustee.¹⁷ Although this clause makes it clear that the terms of the trust will prevail over the Code, its inclusion in a limited number of sections poses a statutory interpretation problem as to some sections in which the clause does not appear.

At one extreme is the argument that every section of the Code which does not specifically permit the terms of the trust to provide otherwise prohibits any deviation which the terms of the trust might purport to authorize. This position is based on the general rule of statutory construction that the expression of one area of coverage is the exclusion of another.¹⁸ If the legislature had intended to allow terms of the trust to prevail over certain Code sections, it would have included in those sections the clause "unless the terms of the trust provide otherwise."

Pub. L. No. 416, ch. 1, § 7 [1971] Ind. Acts 1913; IND. ANN. STAT. § 31-1307 (Supp. 1971). The comment in question states:

This section retains the prior law that the intent of the settlor as manifested in the terms of the trust of [sic] controlling *unless* it is in violation of some positive rule of law or against public policy

Comment to Pub. L. No. 416, ch. 1, § 3, [1971] Ind. Acts 1912; IND. ANN. STAT. § 31-1303 (Supp. 1971) (citations omitted; emphasis added). Of the cases cited in the comment as authority for "the prior law" none involved direct conflict with an established rule of trust law. Rather, the trusts in question were construed to avoid such conflict. *Powell v. Madison Safe Deposit & Trust Co.*, 208 Ind. 432, 196 N.E. 324 (1935) (allocation to principal or income in situation in which settlor did not specifically indicate his intent); *Sellers v. Milford*, 101 Ind. App. 590, 198 N.E. 456 (1935) (illegal investment in situation involving trustee's limited discretionary power); *Warner v. Keiser*, 93 Ind. App. 547, 177 N.E. 369 (1931) (trust construed so as to avoid violating the Rule Against Perpetuities); *McNew v. Vert*, 43 Ind. App. 83, 86 N.E. 969 (1909) (trust construed in accord with purpose and intent of settlor). These cases set forth the general rule in dicta.

15. See, e.g., Pub. L. No. 416, ch. 3, §§ 3, 6(b), [1971] Ind. Acts 1919, 1923; IND. ANN. STAT. §§ 31-1503, -1506(b) (Supp. 1971).

16. See, e.g., Pub. L. No. 416, ch. 5, § 1 *et seq.*, [1971] Ind. Acts 1936; IND. ANN. STAT. §§ 31-1701 *et seq.* (Supp. 1971).

17. See, e.g., Pub. L. No. 416, ch. 6, §§ 3(a), 4, 8(a), [1971] Ind. Acts 1951, 1953; IND. ANN. STAT. §§ 31-1803(a), -1804, -1808(a) (Supp. 1971).

18. 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 4915-16 (3d ed. 1943).

There are at least two reasons for discounting this strict method of construction. First, such a narrow interpretation would render meaningless the general provision that the terms of the trust shall control whenever in conflict with a rule of law unless the rule of law clearly prohibits or restricts the particular trust terms. As a general rule of statutory construction, a court should adopt an interpretation which, if possible, gives reasonable meaning and effect to all sections.¹⁹ Indeed, if the legislature had intended such a narrow construction, it would have provided that, in the event of conflict, the Code will prevail unless its specific provisions expressly permit the trust to provide otherwise. Secondly, there are many Code provisions in which the "unless otherwise provided" clause does not appear and with which the trust terms might conflict without violating a rule which "clearly prohibits or restricts" the act which the trust terms permit. For example, the code provides that in the event of disclaimer by a beneficiary, his interest in the trust estate will be administered as if he had died prior to the effective date of the trust.²⁰ There seems to be no reason why the settlor should not be permitted to make a different disposition of the disclaiming beneficiary's interest. This section and similar sections of the Code²¹ indicate that a trust should be able to provide for a different result even though the appropriate Code section does not contain an "unless otherwise provided" clause.

At the other extreme is the interpretation that all sections of the Code are subject to being overridden by the conflicting terms of a trust. The obvious fallacy in this interpretation is that the Code includes certain fundamental rules of law which cannot be ignored without destroying the entire concept of a trust. The Code provides the method for creating trusts,²² permits court rescission and reformation of trusts²³ and defines the rights of third parties dealing with a trustee.²⁴ For

19. The much-used *expressio unius* and *ejusdem generis* rules assume that particularity is inconsistent with generality, and thus, statutory enumeration restricts judicial application. This is inconsistent with human experience. Normally when a person particularizes and then generalizes his intent is to include something more than his particulars; otherwise, he would be making a meaningless addition to an already understandable term.

Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 338-39 (1949).

20. Pub. L. No. 416, ch. 2, § 4, [1971] Ind. Acts 1915; IND. ANN. STAT. § 31-1404 (Supp. 1971).

21. See notes 186-93 *infra* & text accompanying.

22. Pub. L. No. 416, ch. 2, § 1, [1971] Ind. Acts 1913; IND. ANN. STAT. § 31-1401 (Supp. 1971).

23. Pub. L. No. 416, ch. 3, § 25, [1971] Ind. Acts 1932; IND. ANN. STAT. § 31-1525 (Supp. 1971).

24. Pub. L. No. 416, ch. 4, § 1 *et seq.*, [1971] Ind. Acts 1934; IND. ANN. STAT. §§ 31-1601 *et seq.* (Supp. 1971).

example, the trust could not excuse the trustee from fulfilling the Code's requirements that an individual trustee be 21 years of age, of sound mind and of good moral character²⁵ nor could the trust provide for a court other than one exercising probate jurisdiction to consider matters arising under the trust.²⁶

Having found these two extremes of interpretation unreasonable, there still remains the task of ascertaining which provisions of the Code will prevail in the event of conflict with the terms of a trust. Considering the first guiding theme of the Code—the intent of the settlor should be implemented—it is clear that in the event of conflict the burden must rest on the party who claims that the Code prevails. Analysis must, therefore, consist of a review of the provisions of the Trust Code to determine which provisions may not be overridden by conflicting trust terms.

TRUST CODE SECTIONS WITH WHICH TRUST TERMS CANNOT CONFLICT

A number of Code sections can be eliminated from consideration since no conflict with trust terms is possible. Such sections include: (1) those in which the "unless otherwise provided" clause or words of similar import appear; (2) those which permit a settlor to accomplish certain goals and to provide for certain methods of administering the trust; (3) those which pertain to interpreting and construing the Code itself and (4) those which are fundamental to the creation of an enforceable express trust.

Sections in Which the "Unless Otherwise Provided" Clause Appears

The sections of the Code containing this clause appear only in chapters 3 (rights, powers, duties, liabilities and remedies of parties),²⁷ in 5 (administration)²⁸ and in 6 (procedure).²⁹ In these sections no conflict between the trust and the Code is possible.

25. See Pub. L. No. 416, ch. 2, § 11, [1971] Ind. Acts 1917; IND. ANN. STAT. § 31-1411 (Supp. 1971).

26. See Pub. L. No. 416, ch. 6, § 1, [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1801 (Supp. 1971).

27. Pub. L. No. 416, ch. 3, §§ 1(a), 1(d), 3, 4, 6(b), 7(a), 7(c), 8, 19(a), 20(b); [1971] Ind. Acts 1918-19, 1921, 1923-24, 1929-30; IND. ANN. STAT. §§ 31-1501(a), -1501(d), -1503, -1504, -1506(b), -1507(a), -1507(c), -1508, -1519(a), -1520(b) (Supp. 1971).

28. Pub. L. No. 416, ch. 5, §§ 12(a), 16, [1971] Ind. Acts 1944, 1947; IND. ANN. STAT. §§ 31-1712(a), -1716 (Supp. 1971).

29. Pub. L. No. 416, ch. 6, §§ 3(a), 8(a), 8(d), [1971] Ind. Acts 1951, 1953; IND. ANN. STAT. §§ 31-1803(a), -1808(a), -1808(d) (Supp. 1971).

The sections containing the clause in chapter 3 encompass the powers, duties and liabilities of the trustee and, to a lesser extent, those of the settlor and beneficiaries. According to chapter 5, unless the terms of the trust provide otherwise, the trustee must file an annual written account with the beneficiaries, and the trustee is entitled to a reasonable compensation. In addition, all of the provisions in chapter 5 concerning allocation and apportionment of receipts to or between principal and income and the provision for charging expenses to principal or income are subject to the paramount terms of the trust. This follows since these sections are applicable only "in the absence of any contrary terms of the trust instrument."³⁰ As mandated in chapter 6, unless the terms of the trust provide otherwise, venue for matters arising under the Code lies exclusively in the county in which the principal place of administration of the trust is located, no bond is required of a trustee and the court may require a bond of a court-appointed trustee.

Permissive Sections

Sections which permit a settlor to accomplish certain goals or to provide for certain methods of administration are dispersed throughout the Code. Since these provisions are permissive rather than mandatory, the possibility of conflict between the terms of a trust and the Code is eliminated. These provisions have, therefore, the same effect as those containing the clause, "unless the terms of the trust provide otherwise." The provisions include those permitting a beneficiary and a trustee to be the same person,³¹ permitting an unfunded life insurance trust,³² validating an almost passive "land trust,"³³ allowing spendthrift trusts³⁴ and permitting revocation if the settlor has retained an unrestricted power to modify the trust.³⁵ The settlor may also provide that the court shall

30. Pub. L. No. 416, ch. 5, §§ 1-11, [1971] Ind. Acts 1936-42; IND. ANN. STAT. §§ 31-1701 to -1711 (Supp. 1971). This clause is a parallel formulation of the "unless otherwise provided" clause.

31. Pub. L. No. 416, ch. 1, § 1(b), ch. 2, § 11(c), [1971] Ind. Acts 1911, 1917; IND. ANN. STAT. §§ 31-1301(b), -1411(c) (Supp. 1971). Cf. Pub. L. No. 416 ch. 2, § 8, [1971] Ind. Acts 1916; IND. ANN. STAT. § 31-1408 (Supp. 1971) (sole beneficiary and sole trustee may not be the same person).

32. Pub. L. No. 416, ch. 2, § 5, [1971] Ind. Acts 1915; IND. ANN. STAT. § 31-1405 (Supp. 1971).

33. Pub. L. No. 416, ch. 2, § 13, [1971] Ind. Acts 1917; IND. ANN. STAT. § 31-1413 (Supp. 1971). See also Pub. L. No. 416, ch. 2, § 14, [1971] Ind. Acts 1918; IND. ANN. STAT. § 31-1414 (Supp. 1971) (transfer of beneficial interest in land trust expressly authorized).

34. Pub. L. No. 416, ch. 3, § 2(a), [1971] Ind. Acts 1919; IND. ANN. STAT. § 31-1502(a) (Supp. 1971). A spendthrift trust is called a "trust with protective provisions."

35. Pub. L. No. 416, ch. 3, § 1(b), [1971] Ind. Acts 1918; IND. ANN. STAT. § 31-1501(b) (supp. 1971).

have continuing jurisdiction over the trust³⁶ and that the trust shall be docketed with the court.³⁷

A section of the Code similar to the "permissive" sections is that delimiting the trustee's liability when he follows the instructions of a third person who has been empowered by the trust to direct him.³⁸ This section by implication permits the settlor to provide for a third person with such powers. Therefore, the terms of a trust designating such an advisor or director will not conflict with the provisions of the Code.

Sections Relating Solely to the Trust Code

Nearly all sections of chapter 1 (general provisions) are aids in the interpretation and construction of the Code.³⁹ That chapter also excludes certain trusts and other relationships or entities from the Code's provisions⁴⁰ and provides for application of the Code to pre-existing trusts.⁴¹ Since these provisions concern only the Code and not the substantive matters of trusts themselves, the terms of a trust could neither affect nor be in conflict with these provisions.

Similar provisions appear elsewhere in the Code. Except as expressly provided, the Code is not to be construed to limit the general equity powers of courts over the administration of trusts.⁴² There is also the general provision that jurisdiction lies with the court exercising probate jurisdiction for "all matters arising under this article."⁴³ No one would seriously contend that trust terms could dictate which court has jurisdiction over trust matters.

Sections Fundamental to the Application of the Code

Certain sections of the Code are fundamental to the creation and continued viability of an express trust. If there is no trust, no conflict is

36. Pub. L. No. 416, ch. 6, § 2, [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1802 (Supp. 1971).

37. Pub. L. No. 416, ch. 6, § 4, [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1804 (Supp. 1971).

38. Pub. L. No. 416, ch. 3, § 9(a), [1971] Ind. Acts 1924; IND. ANN. STAT. § 31-1509(a) (Supp. 1971).

39. Pub. L. No. 416, ch. 1, §§ 1(b), 2-3, 5-7, [1971] Ind. Acts 1911-13; IND. ANN. STAT. §§ 31-1301(b), -1302 to -1303, -1305 to -1307 (Supp. 1971).

40. Pub. L. No. 416, ch. 1, § 1(c), [1971] Ind. Acts 1911; IND. ANN. STAT. § 31-1301(c) (Supp. 1971).

41. Pub. L. No. 416, ch. 1, § 4, [1971] Ind. Acts 1913; IND. ANN. STAT. § 31-1304 (Supp. 1971).

42. Pub. L. No. 416, ch. 3, § 30, [1971] Ind. Acts 1934; IND. ANN. STAT. § 31-1530 (Supp. 1971).

43. Pub. L. No. 416, ch. 6, § 1, [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1801 (Supp. 1971). In the Code, a reference to "this article" means the entire Trust Code.

possible. If a purported express trust does not meet certain Code requirements, no express trust exists. Among the fundamental sections are that which defines a trust⁴⁴ and those which require the following: that the trust be in writing signed by the settlor;⁴⁵ that the trust's purpose, property and beneficiaries be identified with reasonable certainty;⁴⁶ that the trustee have powers;⁴⁷ that the settlor have capacity⁴⁸ and that the sole trustee and the sole beneficiary not be the same person.⁴⁹

There are other sections of the Code which are fundamental to the viability of an express trust or of particular terms. For example, a trust or section thereof is invalid if it requires the trustee to commit a criminal or tortious act or an act contrary to public policy.⁵⁰ It is fundamental that the trustee execute and administer the trust in accordance with its terms.⁵¹ To provide otherwise would leave the trustee with no duties, violating a traditional requirement for a valid trust.⁵²

CODE SECTIONS WHICH SHOULD PREVAIL OVER CONFLICTING TRUST TERMS

The determination of those Code sections over which the terms of a trust will prevail in the event of conflict can be made by continuing the step-by-step analysis of the Code provisions. This analysis will result in identifying which of the remaining provisions of the Code establish, or are based upon, rules of law which "clearly prohibit or restrict the article which the terms of the trust purport to authorize."⁵³ After this process of elimination, there remain the sections of the Code over which conflicting terms of the trust will prevail. This procedure is warranted for

44. Pub. L. No. 416, ch. 1, § 1(a), [1971] Ind. Acts 1911; IND. ANN. STAT. § 31-1301(a) (Supp. 1971).

45. Pub. L. No. 416, ch. 2, § 1(a), [1971] Ind. Acts 1913; IND. ANN. STAT. § 31-1401(a) (Supp. 1971).

46. Pub. L. No. 416, ch. 2, § 1(b), [1971] Ind. Acts 1914; IND. ANN. STAT. § 31-1401(b) (Supp. 1971).

47. Pub. L. No. 416, ch. 2, § 9, [1971] Ind. Acts 1917; IND. ANN. STAT. § 31-1409 (Supp. 1971).

48. Pub. L. No. 416, ch. 2, § 10, [1971] Ind. Acts 1917; IND. ANN. STAT. § 31-1410 (Supp. 1971).

49. Pub. L. No. 416, ch. 2, § 8, [1971] Ind. Acts 1916; IND. ANN. STAT. § 31-1408 (Supp. 1971).

50. Pub. L. No. 416, ch. 2, § 12, [1971] Ind. Acts 1917; IND. ANN. STAT. § 31-1412 (Supp. 1971).

51. *Koehler v. Koehler*, 75 Ind. App. 510, 121 N.E. 450 (1919); *Smith v. Taylor*, 34 Ind. App. 194, 72 N.E. 651 (1904). The Code codifies this duty. See Pub. L. No. 416, ch. 3, § 6(a), [1971] Ind. Acts 1923; IND. ANN. STAT. § 31-1506(a) (Supp. 1971).

52. Pub. L. No. 416, ch. 2, § 9, [1971] Ind. Acts 1917; IND. ANN. STAT. § 31-1409 (Supp. 1971).

53. Pub. L. No. 416, ch. 1, § 3, [1971] Ind. Acts 1912; IND. ANN. STAT. § 31-1303 (Supp. 1971).

several reasons. First, since the intent of the settlor as expressed in the terms of the trust should prevail, the burden lies with those who claim that provisions of the Code prevail. Second, as a practical matter, all the provisions of the Code are available for scrutiny, while the terms of thousands of trusts are not.

In determining whether the terms of the trust or the provisions of the Code prevail in the event of conflict, the Code provisions should yield to terms of the trust unless to do so would: (1) violate long-standing pronouncements of public policy which have been codified in the Code; (2) impair or jeopardize the trust relation or basic trust administration; (3) impair or defeat the rights of third parties who are not settlors, trustees or beneficiaries; or (4) impair or defeat the powers of the court with jurisdiction over the trust.⁵⁴ Although different criteria might be applied and the lines between these four criteria might not be altogether distinct, they do provide a meaningful basis for evaluating the Code provisions for the stated purpose.

Code Provisions Which Uphold Matters of Public Policy

Provisions of the Code which codify matters of public policy can be categorized as those which restate or assure the duty of loyalty of the trustee, those which require the trustee to administer the trust in accordance with its terms, those which protect a beneficiary from a trustee's abuse of his fiduciary position, those which provide that a trustee need not act at his peril, those which protect a beneficiary who is incompetent and those in which the public is a beneficiary.

Whether it is considered a matter of public policy or a fundamental principle of trust law, the trustee's duty of loyalty is paramount. As Professor Scott states:

The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust but because of the relationship which arises from the creation of the trust. . . . In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust.⁵⁴

Thus, those sections of the Code which tend to uphold and assure this duty of loyalty should prevail in the event of conflict with terms of the trust. Further support for this contention can be drawn from the long-

54. II SCOTT, *supra* note 9, § 170.

standing position of the courts with respect to exculpatory clauses relieving a trustee from liability for breach of trust. Courts have construed such clauses narrowly and have found liability for acts of bad faith or wilful breach regardless of such clauses.⁵⁵

One section of the Code upholding the trustee's duty of loyalty provides that, if the duty of the trustee in the exercise of any power conflicts with his individual interest or his interest as trustee of another trust, the power may be exercised only with court authorization.⁵⁶ This section applies even if the settlor has empowered his trustee to deal with himself, since this section is only applicable when the trustee has such a power. Indeed, the trustee can only have the power to deal with himself if authorized by the terms of the trust.⁵⁷ Court authorization assures that the duty of loyalty will be observed even when the trustee is given the right of self-dealing.⁵⁸

It is less clear whether court authorization is needed to safeguard the duty of loyalty of a trustee who administers several trusts and deals between them. The Code expressly permits dealing between trusts when it is fair and reasonable to all beneficiaries and complete disclosure is made to the beneficiaries of both trusts.⁵⁹ Since no personal gain for the trustee is involved, a majority of courts have held that transactions between trusts cannot be set aside if fair to both trusts.⁶⁰ It would appear, therefore, that when the trustee abides by the Code section permitting intertrust dealing, court authorization is not necessary. The trustee should not, however, be able to dispense with the requirement of disclosure to

55. RESTATEMENT (SECOND) OF TRUSTS § 222 (1959).

No matter how broad the provision may be, the trustee is liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust.

III SCOTT, *supra* note 9, § 222.3, at 1777; *see also* Annot., 158 A.L.R. 276, 285 (1945).

56. Pub. L. No. 416, ch. 3, § 5, [1971] Ind. Acts 1922; IND. ANN. STAT. § 31-1505 (Supp. 1971).

57. Pub. L. No. 416, ch. 3, § 7(a), [1971] Ind. Acts 1923, IND. ANN. STAT. § 31-1507(a) (Supp. 1971): "*Unless the terms of the trust provide otherwise, the trustee has a duty: (1) not to loan funds to himself or an affiliate. . . (emphasis added).*"

58. Examples of self-dealing include a trustee buying from or selling to the trust, a corporate trustee investing in shares of its own stock, a trustee taking a bonus or commission on sales to the trust or competing in business with the trust and almost any other situation in which the trustee's personal interest might conflict with his fiduciary duties. *See The Trustee's Duty of Loyalty*, 6 REAL PROP., PROB. & TRUST J. 528, 530 (1971) (situations held to constitute self-dealing).

59. Pub. L. No. 416, ch. 3, § 7(c), [1971] Ind. Acts 1924; IND. ANN. STAT. § 31-1507(c) (Supp. 1971).

60. *See* II SCOTT, *supra* note 9, § 170.16; Annot., 129 A.L.R. 150 (1940). *But see* UNIFORM TRUSTS ACT § 6.

all beneficiaries, since this is the crucial safeguard against breaches of the duty of loyalty.

In this same area of loyalty, the Code provides that a trustee who is permitted for his own personal benefit to deal with a beneficiary must deal fairly and make a complete disclosure to the beneficiary.⁶¹ To permit the terms of a trust to authorize such dealing without these safeguards would be in derogation of long established trust law.⁶² Without this duty of fairness and the requirement of complete disclosure there would be little or no deterrent to the trustee who is in a position to take advantage of the beneficiary. The trust terms should not, as a result, prevail in the event of conflict with these requirements of the Code.

Those Code provisions which attempt to assure that the trustee abides by his duty of loyalty should also prevail in the event of conflict with terms of the trust. One such "assurance" provision is that which permits the court, in its discretion, to deny a trustee compensation when he has breached trust obligations.⁶³ Professor Bogert states:

The [fee] is allotted for an execution of the trust *with the highest degree of good faith* and with ordinary skill and care.⁶⁴

The general rule that the court may disallow all or part of a trustee's fees for breach of trust is long-standing and widely followed.⁶⁵ When the breach involves the duty of loyalty, the courts have uniformly held that the trustee is not entitled to compensation.⁶⁶

A similar provision assuring loyalty is that which permits the settlor, a beneficiary or any person having an interest in the administration or benefits of the trust to petition the court to require the trustee to file a verified written statement of account with the court.⁶⁷ In this

61. Pub. L. No. 416, ch. 3, § 7(b), [1971] Ind. Acts 1924; IND. ANN. STAT. § 31-1507(b) (Supp. 1971).

62. RESTATEMENT (SECOND) OF TRUSTS § 170, comment *w* (1959). See Troyak v. Enos, 204 F.2d 536 (7th Cir. 1953); Whitesell v. Strickler, 167 Ind. 602, 78 N.E. 845 (1906); Schemmel v. Hill, 91 Ind. App. 373, 169 N.E. 678 (1930).

63. Pub. L. No. 416, ch. 5, § 17, [1971] Ind. Acts 1947; IND. ANN. STAT. § 31-1717 (Supp. 1971). In the exercise of its discretion, the court may consider whether the trustee acted in good faith and whether the breach was intentional.

64. G. BOGERT, TRUSTS & TRUSTEES § 980, at 404 (2d ed. 1962) [hereinafter cited as BOGERT].

65. *Id.*; III SCOTT, *supra* note 9, § 243.

66. Annot., 110 A.L.R. 573 (1937).

67. Pub. L. No. 416, ch. 5, § 12(c), [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1712(c) (Supp. 1971). It should be noted that this subsection does not expressly state that such verified written statement of accounts shall be filed with the court. It is implied, however, when considered in the context of other parts of the Code. When referring to accounts to be delivered to beneficiaries, the Code refers to them as "written

manner the beneficiary can ascertain whether the estate is being administered properly and can invoke the assistance of the court to require the trustee to redress any breach. Without this right, a beneficiary would either be unable to enforce the trust for his benefit or be delayed to the extent that his beneficial interest could be seriously jeopardized.

There are areas other than the duty of loyalty in which public policy should be considered in analyzing Code provisions to ascertain whether they prevail in the event of conflict with terms of the trust. It has long been established that a person should not be required to act at his peril, particularly a trustee in the administration of his trust.⁶⁸ In *Messner v. DeMotte*,⁶⁹ the Indiana Appellate Court stated:

A trustee need not act at his peril. He may under appropriate circumstances apply to the court for advice and instructions, and obtain from the court a construction of the trust instrument. Such right he has both in equity and by enactment in this state.⁷⁰

In addition, Indiana's Declaratory Judgment Act⁷¹ provides that a trustee may have a declaration of rights or legal relations with respect to administration of a trust.⁷² The codification⁷³ of this long-standing right of a trustee to apply to the court for instructions when reasonably in doubt clearly demonstrates that the terms of the trust cannot deny a trustee the right.

A similar Code provision provides that the trustee is entitled to review and settlement by the court of the accounts of his administration.⁷⁴ If the trust does not provide for continuing jurisdiction by the court or if the trust is not a trust for benevolent public purposes, the

statement[s] of accounts." Pub. L. No. 416, ch. 5, § 12(a), [1971] Ind. Acts 1944; IND. ANN. STAT. § 31-1712(a) (Supp. 1971). When referring to accounts to be filed with the court, the Code refers to them as "verified written statement[s] of accounts." Pub. L. No. 416, ch. 5, §§ 12(d), 13(a), [1971] Ind. Acts 1945; IND. ANN. STAT. §§ 31-1712(a), -1713(a) (Supp. 1971).

68. A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust.

III Scott, *supra* note 9, § 259, at 2214.

69. 119 Ind. App. 273, 82 N.E.2d 900 (1948).

70. *Id.* at 281, 82 N.E.2d at 903; *accord*, *Gibault Home for Boys v. Terre Haute First Nat'l Bank*, 227 Ind. 410, 85 N.E.2d 824 (1949).

71. IND. CODE ch. 34-4-10 (1971); IND. ANN. STAT. § 3-1101 *et seq.* (1968).

72. IND. CODE § 34-4-10-4 (1971); IND. ANN. STAT. § 3-1104 (1968).

73. Pub. L. No. 416, ch. 3, § 18(a), [1971] Ind. Acts 1928; IND. ANN. STAT. § 31-1518(a) (Supp. 1971).

74. Pub. L. No. 416, ch. 3, § 18(b), [1971] Ind. Acts 1928; IND. ANN. STAT. § 31-1518(b) (Supp. 1971).

trustee has no duty to file an account with the court.⁷⁵ It would appear, therefore, that the rights of court review and account settlement may be invoked by the trustee for protection in situations in which he is not required to file an account with the court. To permit a trust to deprive the trustee of this right would possibly subject him to prolonged harassment by disgruntled beneficiaries. Therefore, notwithstanding trust terms to the contrary, a trustee should have the right to have a dispute settled by a court just as the beneficiary has a right to require an accounting.⁷⁶

The Code provides that by certain acts such as participation, consent or release a beneficiary may relieve a trustee from liability for breach of trust.⁷⁷ Such relief is not effective, however, if the beneficiary was under an incapacity, was not informed of material facts which the trustee knew or was induced by the trustee's improper conduct or if the trustee had an adverse interest in an unfair and unreasonable transaction.⁷⁸ In such cases the trustee's duty of loyalty to the beneficiary is violated. Because this duty is fundamental to the trust relationship, terms of the trust contrary to these limitation provisions should not prevail in the event of conflict.

When the public is involved, the trust by its terms should not be able to detract from the public's right to enforce its interests. Thus, in the case of a trust for benevolent public purposes, the provision of the Code for an accounting by the trustee to the court is mandatory. This accounting forms the basis upon which the benefited public gains knowledge of the trust's administration. To permit trust terms to dispense with such an accounting or any of the substantive content required by the Code⁸⁰ would permit the trustee to shield his actions from public

75. Pub. L. No. 416, ch. 5, §§ 12(b), (d), [1971] Ind. Acts 1945; IND. ANN. STAT. §§ 31-1712(b), (d) (Supp. 1971).

76. Pub. L. No. 416, ch. 5, § 12(c), [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1712(c) (Supp. 1971).

77. Pub. L. No. 416, ch. 3, § 19(a), [1971] Ind. Acts 1929; IND. ANN. STAT. § 31-1519(a) (Supp. 1971).

78. Pub. L. No. 416, ch. 3, § 19(b), [1971] Ind. Acts 1929; IND. ANN. STAT. § 31-1519(b) (Supp. 1971).

79. "[T]he trustee *shall* file a verified written statement annually with the court." Pub. L. No. 416, ch. 5, § 12(b), [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1712(b) (Supp. 1971) (emphasis added). The enactment of the Code repealed the prior statutes requiring an annual accounting with the circuit court in the case of public charitable trusts. IND. CODE §§ 30-2-2-1, -2 (1971); IND. ANN. STAT. §§ 31-712, -713 (1969) (repealed 1971). In *Ackerman v. Fichter*, 179 Ind. 392, 101 N.E. 493 (1913), an early Indiana case construing the prior statutes, the supreme court held that terms of a testamentary charitable trust providing for no accounting would yield to the statute requiring accounting to the court.

80. Pub. L. No. 416, ch. 5, § 13, [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1713 (Supp. 1971).

scrutiny. To assure that the accounting requirement is met, the Code provides that in the case of a trust for public benevolent purposes, a court upon petition by the attorney general has the power to direct a trustee to file a verified written statement of account.⁸¹ To permit the trust by its terms to eliminate or detract from this right would, in effect, permit the settlor to prevent the attorney general from thus protecting the public interest.

Code Provisions Which Protect the Trust Relationship

When a settlor's intent to create a trust is clear, terms of the trust which would inadvertently defeat or impair the intended trust should not prevail over the Code in the event of conflict. An example of the problem posed by this type of conflict is provided by the Code provision that "the trustee takes title to the trust property."⁸² Since the definition of a valid trust requires that the trustee take title to the trust property,⁸³ a contrary trust provision cannot be effective.⁸⁴ The same rationale applies to the provision of the Code which states that the beneficiary takes an equitable interest in the trust property.⁸⁵

Less apparent problems arise when the terms of the trust impose restrictions on the rights and powers of beneficiary or trustee in conflict with those set forth in the Code. For example, does a beneficiary have an interest (property right) in the trust if he cannot legally enforce it because of restrictions imposed upon him by the terms of the trust? In order to have a right or interest in anything, it must be enforceable by law.⁸⁶ As a result, terms of a trust which eliminate the power of a beneficiary to enforce his rights could effectively eliminate the interest of the beneficiary and thus destroy or greatly impair the trust.⁸⁷

81. Pub. L. No. 416, ch. 5, § 12(c), [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1712(c) (Supp. 1971).

82. Pub. L. No. 416, ch. 2, § 6(a), [1971] Ind. Acts 1916; IND. ANN. STAT. § 31-1406(a) (Supp. 1971).

83. A trust is a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held. Pub. L. No. 416, ch. 1, § 1(a), [1971] Ind. Acts 1911; IND. ANN. STAT. § 31-1301(a) (Supp. 1971).

84. This conclusion is, of course, based on the premise that the settlor intends to create a trust. It is possible that the terms of the writing are such that no trust is created, in which event the Code does not apply and no conflict is possible.

85. Pub. L. No. 416, ch. 2, § 7(a), [1971] Ind. Acts 1916; IND. ANN. STAT. § 31-1407(a) (Supp. 1971).

86. *In re Gogabashvele's Estate*, 195 Cal. App.2d 503, 16 Cal. Rptr. 77 (Dist. Ct. App. 1961); *Bailey v. Miller*, 45 Ind. App. 475, 91 N.E. 24 (1910); *Schmitt v. Jenkins Truck Lines, Inc.*, 260 Iowa 556, 149 N.W.2d 789 (1967). See also RESTATEMENT OF PROPERTY § 1 (1936); *Corbin, Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

87. This situation is, of course, distinguishable from those caused by a statute of

This right of the beneficiary to enforce the trust is fundamental whether his interest is deemed one in property (proprietary) or merely a right enforce the trust against the trustee. Professor Scott states:

[W]hen property is transferred by one person to another to the use of or in trust for a third person, there is not and there never has been any doubt of the right of that third person to enforce the use or trust. . . .⁸⁸

Professor Bogert, while recognizing the trend toward considering the beneficiary's interest proprietary, states:

The nature of the beneficiary's rights would seem to be summarized by the statement that while the right of the beneficiary originally was solely in personam against the trustee, it has increasingly become a right in rem and is now substantially equivalent to equitable ownership of the trust res. The beneficiary, of course, also has rights in personam against the trustee.⁸⁹

Finally, the comments to the Code describe the beneficiary's equitable interest as being his right to enforce the trust.⁹⁰ The public policy of Indiana appears to protect the power of a person to pursue his rights in such cases. In an analogous situation under the Probate Code, it is provided that a provision of a will is void if it specifies that any beneficiary who contests the will shall forfeit his benefits under it.⁹¹

Some Trust Code provisions confer duties on the trustee which give rise to implied rights in the beneficiary. These rights are essential if the beneficiary is to enforce the trust effectively. One such provision makes the trustee accountable to the beneficiary for the trust estate.⁹² Being "accountable to the beneficiary" does not mean merely furnishing a statement of accounts but also encompasses liability to the beneficiary for the care and control of the trust property, including both

limitations which removes the power to enforce a right because of the passage of time or a statute of frauds which renders a right unenforceable because the promise on which it is based is not in writing.

88. Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 270 (1917) [hereinafter cited as *Nature of Rights*].

89. BOGERT, *supra* note 64, § 183, at 262-64.

90. Comment to Pub. L. No. 416, ch. 2, § 7, [1917] Ind. Acts 1916; IND. ANN. STAT. § 31-1407 (Supp. 1971).

91. IND. CODE § 29-1-6-2 (1971); IND. ANN. STAT. § 6-602 (1953). See Kenner, *Noncontesting Clauses in Wills*, 3 IND. L.J. 269 (1928).

92. Pub. L. No. 416, ch. 3, § 11(a), [1971] Ind. Acts 1926; IND. ANN. STAT. § 31-1511(a) (Supp. 1971).

the trust principal and earned income.⁹³ To permit the trust terms to negate this duty of accountability would effectively prevent the beneficiary from enforcing his right to hold the trustee liable for administration of the trust. Since the right of the beneficiary to enforce the trust cannot be eliminated by the terms of the trust, neither can the duty upon which it rests.

In other instances the Code expressly provides the beneficiary with remedies to enforce his rights under the terms of the trust. These remedies lie against the trustee,⁹⁴ third parties⁹⁵ and cobeneficiaries.⁹⁶ The remedies against the trustee may be invoked both to recover trust property if the trustee breaches the trust and to prevent the trustee from breaching the trust. The remedies against a cobeneficiary are available when no recovery can be had against the trustee with whom the cobeneficiary participated in a breach of trust. The remedies against third persons are available when the trustee has a claim against a third person but refuses or neglects to pursue it. In each situation, if the beneficiary is prevented by the terms of the trust from pursuing these remedies, his rights may be effectively negated and his interest in the trust lost. Such terms should not, therefore, prevail over Code provisions which empower the beneficiary to enforce his rights.

The beneficiary's rights to pursue a third party directly are a departure from the common law which held that the trustee, and not the beneficiary, must maintain the action.⁹⁷ The common law developed, however, to permit a beneficiary to pursue the third party as a codefendant with the trustee when the trustee refused or was unable to act.⁹⁸ The Code eliminates the necessity of joining the trustee as a codefendant but requires the plaintiff beneficiary to sue for the benefit of all beneficiaries.⁹⁹ Since the beneficiary's rights against a third party are not

93. See *Rock Island Auction Sales, Inc. v. Empire Packing Co.*, 32 Ill.2d 269, 204 N.E.2d 721 (1965); *Sullivan v. Carmany*, 384 Pa. 486, 121 A.2d 174 (1956).

94. Pub. L. No. 416, ch. 3, § 22, [1971] Ind. Acts 1930; IND. ANN. STAT. § 31-1522 (Supp. 1971).

95. Pub. L. No. 416, ch. 3, § 21, [1971] Ind. Acts 1930; IND. ANN. STAT. § 31-1521 (Supp. 1971).

96. Pub. L. No. 416, ch. 3, § 23, [1971] Ind. Acts 1931; IND. ANN. STAT. § 31-1523 (Supp. 1971).

97. Even in the modern law, however, the beneficiaries' interest is protected through proceedings brought by the trustee. . . . The beneficiaries therefore have no direct claim against the tortfeasor, but must work out their rights through the trustee.

IV SCOTT, *supra* note 9, § 282, at 2337.

98. *Id.*, § 282.1. See *Wright v. Mack*, 95 Ind. 332 (1883). Cf. *Voorhees v. Carpenter*, 127 Ind. 300, 26 N.E. 838 (1890).

99. Pub. L. No. 416, ch. 3, § 21, [1971] Ind. Acts 1930; IND. ANN. STAT. § 31-1521 (Supp. 1971).

impaired if the trust requires the trustee to be joined as a codefendant, the terms of a trust should prevail in the event of a conflict with the Code. On the other hand, the trust by its terms should not be able to permit a single beneficiary to recover for only his interest when there are several beneficiaries. To permit this latter situation would unnecessarily open the door to a multiplicity of suits on separate claims.

This brief analysis of the one section of the Code that deals with the remedies of the beneficiary against third persons is indicative of the problems faced when attempting to decide whether particular Code sections should prevail in the event of conflict with terms of the trust. While the basic rights of the beneficiary against third persons provided in the Code should not be impaired, the procedure for pursuing these rights could yield to conflicting terms of a trust without impairing the beneficiary's interests.

A similar analysis can be made of the Code provision which sets forth a beneficiary's remedies against a cobeneficiary who participates in, or consents to, a breach of trust by the trustee¹⁰⁰ and the provision which states that a trustee, by certain acts or failures to act, is liable to the beneficiary for breach by a cotrustee.¹⁰¹ This latter provision would not apply to the trustee who, by the terms of the trust, had limited duties not related to the breach by his cotrustee or had no duties to supervise or participate with his cotrustee in the administration of the trust.¹⁰²

In addition to providing remedies for the beneficiary, the Code provides rights and remedies for the trustee against beneficiaries,¹⁰³ cotrustees¹⁰⁴ and third parties.¹⁰⁵ The trustee may recover for losses occasioned by a beneficiary's misappropriation of trust property, a

100. Pub. L. No. 416, ch. 3, § 23, [1971] Ind. Acts 1931; IND. ANN. STAT. § 31-1523 (Supp. 1971).

101. Pub. L. No. 416, ch. 3, § 12, [1971] Ind. Acts 1927; IND. ANN. STAT. § 31-1512 (Supp. 1971).

102. Many instruments which are drawn with the advice of corporate trustees and which provide for a co-trusteeship in which a trust institution is to be joined with one or more individuals contain a clause to the effect that custody of the trust property shall be vested in the corporate trustee and sometimes that other functions shall be exercised by it exclusively. If the settlor is willing to accept these terms, it would seem that they should be enforced, since they do not appear to violate any principle of public policy, unless they deprive the individual trustees of all powers.

BOGERT, *supra* note 64, § 590, at 256.

103. Pub. L. No. 416, ch. 3, §§ 17, 20(a), [1971] Ind. Acts 1928, 1930; IND. ANN. STAT. §§ 31-1517, -1520(a) (Supp. 1971).

104. Pub. L. No. 416, ch. 3, §§ 14, 16, [1971] Ind. Acts 1927, 1928; IND. ANN. STAT. §§ 31-1514, -1516 (Supp. 1971).

105. Pub. L. No. 416, ch. 3, § 15, [1971] Ind. Acts 1928; IND. ANN. STAT. § 31-1515 (Supp. 1971).

beneficiary's failure to repay a loan or advance and a beneficiary's breach of a contract to deliver property or pay money to the trust estate. As to cotrustees, the trustee can seek to enjoin a threatened breach of trust and compel redress if a breach occurs. The trustee is also entitled to contributions from, or indemnification by, the cotrustee if the latter was at fault. With respect to third parties, the trustee may maintain any action which he could maintain on his own right if he were the owner. These rights are necessary if a trustee is to preserve the trust estate¹⁰⁶ and enforce claims on behalf of the trust.

The basic duty of the trustee to enforce claims has likewise been codified.¹⁰⁷ If the trustee has no powers to enforce claims on behalf of the trust in these situations, the result might be the loss by the trustee of all interest in the trust property. This would, of course, destroy the trust.¹⁰⁸

Other provisions of the Code protect the trust estate from third-party claims not arising in the administration of the trust. The most obviously important is the section directing that a judgment against a trustee individually not be a lien upon the trust estate.¹⁰⁹ If the trust instrument provides otherwise, the trust estate could be dissipated to the personal benefit of the trustee. Not only would this appear to violate the trustee's duty of loyalty, but it could destroy the trust by destroying the trust estate.

While the trust estate is not subject to claims against the trustee individually, the interest of the beneficiary is subject to the claims of the beneficiary's creditors unless valid "protective provisions" are set forth in the trust.¹¹⁰ The Trust Code does provide, however, that when the trust

106. The obligation to preserve the trust estate is set forth in the Code. Pub. L. No. 416, ch. 3, § 6(b)(4), [1971] Ind. Acts 1923; IND. ANN. STAT. § 31-1506(b)(4) (Supp. 1971). This has been recognized as one of the basic duties of a trustee:

The trustee has a duty to protect the trust property against injury or destruction. He is obligated to the cestui to do all acts necessary for he preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for ends similar to those of the trust.

BOGERT, *supra* note 64, § 582, at 216.

107. Pub. L. No. 416, ch. 3, § 6(b)(9), [1971] Ind. Acts 1923, IND. ANN. STAT. § 31-1506(b)(9) (Supp. 1971).

108. Pub. L. No. 416, ch. 1, § 1(a), [1971] Ind. Acts 1911; IND. ANN. STAT. § 31-1301(a) (Supp. 1971).

The duties of the trustee almost universally require him to take into his possession tangible realty or personalty, and to reduce choses in action to possession. This duty of obtaining physical dominion over the trust estate and the documents representing it is a primary obligation of the trustee toward the cestui.

BOGERT, *supra* note 64, § 583, at 279.

109. Pub. L. No. 416, ch. 4, § 3(a), [1971] Ind. Acts 1935; IND. ANN. STAT. § 31-1603(a) (Supp. 1971).

110. RESTATEMENT (SECOND) OF TRUSTS § 147 (1959). See IND. CODE § 34-1-45-1

property is properly sold, the liens against a beneficiary's interest in the trust estate shift from the trust property to the proceeds.¹¹¹ The purpose of this provision is to assure free alienability of the trust property by the trustee.¹¹² While it would not destroy the trust to permit a lien to follow the property rather than the proceeds, it would certainly impair the trustee's powers to deal with the trust estate for the best interests of the beneficiaries. If the settlor makes it clear that the trust property is subject to lien claims by the beneficiary's creditors, the beneficiary should not be heard to complain. A problem could arise, however, with those who deal with the trustee in reliance on the alienability of the trust property. Although liens are generally recorded under the names of the debtor—in this case, the name of the beneficiary—the title to the property would be in the name of the trustee. Therefore, in order to protect third parties dealing with the trustee, the Code should prevail over conflicting terms of the trust. This is a situation in which the terms of the trust should prevail if only the beneficiary's lien claimant and the trustee are involved but in which the Code should prevail if third-party bona fide purchasers without notice of the trust terms are concerned.

The Code provisions discussed in this section should be distinguished from provisions such as that which states that the trustee, absent a breach of trust, has no liability to the beneficiary either for any loss or depreciation in value of the trust property or for a failure to make profit.¹¹³ If the terms of the trust provide that the trustee is liable for losses irrespective of breach of trust or that the trustee, with no power to distribute trust corpus, must pay a certain amount to the beneficiary, the relationship may be deemed an equitable charge¹¹⁴ or

(1971); IND. ANN. STAT. § 2-3613 (1968):

The following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same, or for whose use the same is holden, viz.:

.....

Fourth Lands, or any estate, or interest therein, holden by any one in trust for, or to the use of another.

See also *Maxwell v. Vaught*, 96 Ind. 136 (1884); *Cox v. Arnsmann*, 76 Ind. 210 (1881).

111. Pub. L. No. 416, ch. 4, § 3(b), [1971] Ind. Acts 1935; IND. ANN. STAT. § 31-1603(b) (Supp. 1971).

112. Comment to Pub. L. No. 416, ch. 4, § 3(b), [1971] Ind. Acts 1935; IND. ANN. STAT. § 31-1603(b) (Supp. 1971): "The purpose of this subsection is to assure that trust property will be freely transferable irrespective of any beneficiary's status as a debtor."

113. Pub. L. No. 416, ch. 3, § 11(c), [1971] Ind. Acts 1926; IND. ANN. STAT. § 31-1511(c) (Supp. 1971).

114. Ordinarily where property is transferred to another "subject to the payment of" a certain sum to a third person, or "paying" such a sum, an equitable charge and not a trust is created, since the transferor does not thereby manifest an intention to impose a duty upon the transferee to deal with the property for

a contract¹¹⁵ entered into between the trustee and the settlor.¹¹⁶ It is, of course, the intent of the settlor that controls, and it may be his intent that a contract or an equitable charge be created. In either case a relationship other than a trust exists, and the Code does not apply. This Code provision could be considered as part of, or similar to, those which are deemed fundamental to the application of the Code.¹¹⁷

Code Provisions Which Protect the Rights of Third Persons

In any situation in which the provisions of the Code protect the rights of third persons, the terms of the trust should not prevail in the event of conflict. The reasons for this are quite apparent. Initially, the third person is or should be aware of the Code provisions, since they are a matter of statutory law, but he is not necessarily aware of the terms of the trust or even of its existence. Therefore, third parties should be allowed to rely upon Code provisions for the policy reasons of convenience and certainty. Second, the third person is not a party to the trust—he did not participate in its formulation as did the settlor and trustee, nor does he benefit from the trust as does a beneficiary. Thus, there is no reason based on contractual policy which would justify allowing the settlor to abrogate the rights of third parties. Third, if trust terms could negate the protection provided third persons, the Code policy promoting the alienability of trust property would be defeated,

the benefit of the third person. On the other hand, where property is transferred to another with a direction to pay to a third person a certain sum out of the property or its proceeds, or "subject to the payment from the property or its proceeds," or "paying from the property or its proceeds" such sums, a trust and not an equitable charge is created, since the transferor thereby manifests an intention to impose a duty upon the transferee to deal with the property in part at least for the benefit of the third person.

RESTATEMENT (SECOND) OF TRUSTS § 10, comment b (1959).

115. A trust is to be distinguished from a contract for the benefit of a third party. Whether there is a trust or merely a contract for the benefit of a third party depends upon whether there is property held by one person for the benefit of the third party, or merely a personal undertaking to make payment to the third party.

I SCOTT, *supra* note 9, § 14, at 141-42.

116. In connection with the creation of a trust the trustee may of course enter into a contract with the settlor. He may agree to do something other than merely to perform his duties as trustee. Thus he may agree with the settlor that if the trust property should be lost even without his fault he would make good the loss. In such a case if he fails to carry out his promise an action at law for breach of contract can be maintained against him by the settlor, or if the contract was made for the benefit of the cestui que trust, then the latter can maintain an action at law as beneficiary of the contract in jurisdictions in which third-party beneficiaries are entitled to maintain an action.

III *id.*, § 197.2, at 1624.

117. See notes 44-52 *supra* & text accompanying.

since third parties would be deterred from dealing with the trustee. Finally, statutes with effects similar to the Code provisions protecting the rights of third persons have been upheld.¹¹⁸

Working from the premise that trust terms should not prevail when in conflict with Code provisions protecting the rights of third persons, the Code can be reviewed to determine which of its provisions afford such protection to third persons either dealing with or coming into contact with the trustee or trust property. These provisions fall into two general categories, those which expressly affect third persons and those which impliedly or indirectly affect them. The provisions which expressly affect third persons may be divided into two subcategories, those in which the third person voluntarily deals with the trustee or trust property and those in which the third person's contact is involuntary.

In chapter 4 of the Trust Code, express rules governing the rights of third persons are set forth. The first of these rules allows a third person dealing with a trustee, without actual knowledge of the trustee's limited powers, to assume without inquiry that the trustee has the powers that he purports to exercise. This section further provides that the third person is not responsible for application of the payment made to the trustee.¹¹⁹ The second of these express rules provides that the third-person transferee takes title to the trust property free of trust when the transfer is not made in breach of trust and, even when made in breach of trust, if he takes for value, without notice of the breach and without knowledge that it is part of an illegal transaction.¹²⁰ These two provisions of the Code, when construed together, include in the class of protected bona fide purchasers those third persons who have notice of the trust,

118. For example, transfer agents for corporations (third persons) can, pursuant to the Uniform Commercial Code, transfer stock in the name of a fiduciary without inquiry as to the fiduciary's powers. *UNIFORM COMMERCIAL CODE* § 8-403(3)(b); *IND. CODE* § 26-1-8-403 (1971); *IND. ANN. STAT.* § 19-8-403 (1964); *cf.* *UNIFORM FIDUCIARIES ACT* § 3; *IND. CODE* § 30-2-4-3 (1971); *IND. ANN. STAT.* § 31-103 (1969) (repealed 1964, to the extent inconsistent with Uniform Commercial Code). *See also* *UNIFORM ACT FOR THE SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS*; *IND. CODE* § 30-2-5-1 *et seq.* (1971); *IND. ANN. STAT.* § 31-901 *et seq.* (1969). The comment to ch. 4, § 1 of the Trust Code notes that it is not to be construed to be in conflict with this Uniform Act. Comment to Pub. L. No. 416, ch. 4, § 1, [1971] *Ind. Acts* 1934; *IND. ANN. STAT.* § 31-1601 (Supp. 1971).

119. Pub. L. No. 416 ch. 4, § 1(a)(2) [1971] *Ind. Acts* 1934; *IND. ANN. STAT.* § 31-1601(a)(2) (Supp. 1971). It should be borne in mind, nevertheless, that the third person who has actual knowledge of the terms of the trust, or who deals with trust real estate in a county in which the trust is of public record, may not assume that the trustee has authority or power to deal with the trust property. Pub. L. No. 416, ch. 4, §§ 1(b)-(c), [1971] *Ind. Acts* 1934-35; *IND. ANN. STAT.* §§ 31-1601(b)-(c) (Supp. 1971).

120. Pub. L. No. 416, ch. 4, § 2, [1971] *Ind. Acts* 1935, *IND. ANN. STAT.* § 31-1602 (Supp. 1971).

but who do not make inquiry as to the trustee's powers to deal with the trust property. Only those third persons who have actual knowledge either of the terms of the trust or that the transaction is in breach of trust take the trust property subject to the trust. The prior Indiana statutes and the common law rule protected only the third person who was unaware that he was dealing with a trust or trustee.¹²¹ If the third person knew that he was dealing with a trustee, he was bound to make inquiry of the authority of the trustee to make the transfer. The Code clearly favors stronger protection for third parties dealing with trustees than did prior law.

The Code expressly provides that the trustee is not personally liable to a third person on any contract or nonnegotiable instrument made in the administration of the trust unless the contract expressly provides otherwise.¹²² The effect of this provision is that, irrespective of the terms of the trust, unless the contract provides otherwise, the third person has a claim against the trust to enforce the contract or a claim for damages against the trust in the event of breach of the contract. This is not contrary to the modern trend of decisions recognizing a third person's right to proceed against the trust estate in situations in which the contract is not in breach of trust.¹²³ The Code provisions do, however, represent a probable extension of this trend by protecting third parties in situations in which the contract is in breach of trust but the third person is unaware of the terms of the trust or the fact of the breach. Since a third person can assume without inquiry that the trustee is acting within the scope of his authority, this extension is consistent with other provisions of the Code.

In a situation involving a third party's claim for injuries arising from the administration of a trust, the third party deals involuntarily with the trustee and the trust estate. The Code expressly designates the assets against which the third party may proceed—the trustee's individual property or the trust estate—and the order in which satis-

121 IND. CODE 30-1-9-2 (1971); IND. ANN. STAT. § 56-602 (1961) (repealed 1971); *Pillars v. McConnell*, 141 Ind. 670, 40 N.E. 689 (1895); *Ray v. Ferrell*, 127 Ind. 570, 27 N.E. 159 (1891); *Parmlee v. Sloan*, 37 Ind. 469 (1871). See also IV SCOTT, *supra* note 9, § 284, at 2342; *Nature of Rights*, *supra* note 88, at 278.

122. Pub. L. No. 416, ch. 3, § 10(a), [1971] Ind. Acts 1925; IND. ANN. STAT. § 31-1510(a) (Supp. 1971).

123. The notion underlying this view is that the trustee is the manager of the trust estate and that his acts properly performed in the management of the estate create liabilities enforceable against the estate. There is a certain analogy to the doctrines of agency. The difference is that an agent binds his principal personally, whereas a trustee cannot bind the beneficiaries personally, but can only bind the trust estate.

III SCOTT, *supra* note 9, § 271A.1, at 2289-90.

faction can be had from such assets.¹²⁴ The ultimate liability as between the trustee and the trust estate can be provided in the trust, but the rights of injured third persons to proceed against the trustee's individual property or the trust estate should not be changed or taken away by the terms of the trust. This situation is analogous to liability under the master-servant relationship. Irrespective of what the employment agreement may provide, the master is liable to an injured third party if the servant was acting within the scope of his authority.¹²⁵

In other situations the Code provisions indirectly or impliedly affect third persons. For example, a trustee is presumed to have accepted his trusteeship if he exercises powers or performs duties under the trust.¹²⁶ The trust instrument could provide that acceptance by the trustee must be accomplished by a formal written document. This requirement, however, should not adversely affect the rights of third persons who deal in good faith with the "acting trustee." As noted earlier, a third person dealing with the trustee may presume that the trustee has acted with authority to do so. The third person should be able to deal with assurance when the trustee exercises power and performs duties under the trust.

A similar Code provision provides that acceptance of a trust by a beneficiary is presumed. If he intends to disclaim, the beneficiary must do so within a reasonable time (not to exceed three months) after he has received written notice of his interest and after his interest has been indefeasibly fixed as to both quality and quantity.¹²⁷ After expiration of the disclaimer period, the rights of third-party creditors, or of other parties dealing with the beneficiary, should not be adversely affected by any terms of the trust extending the time for disclaimer or dispensing with the presumption of acceptance. Analogous support for the concept of protecting third-person creditors of beneficiaries regardless of trust terms has already been established in Indiana law. Since 1953 the Probate Code has provided that, in the case of testamentary gifts, creditors of a beneficiary may object to the beneficiary's renunciation. In such situations, the court can declare the renunciation ineffective if it finds that

124. Pub. L. No. 416, ch. 3, § 10(b), [1971] Ind. Acts 1925; IND. ANN. STAT. § 31-1510(b) (Supp. 1971).

125. W. PROSSER, *THE LAW OF TORTS*, § 70, at 460, 461 (4th ed. 1971).

126. Pub. L. No. 416, ch. 2, § 2(b) [1971] Ind. Acts 1914; IND. ANN. STAT. § 31-1402(b) (Supp. 1971); cf. Pub. L. No. 416, ch. 2, § 2(d), [1971] Ind. Acts 1914; IND. ANN. STAT. § 31-1402(d) (Supp. 1971) (in emergency situation, to preserve trust estate, named trustee may act and will not be presumed to have accepted if he delivers written rejection within reasonable time).

127. Pub. L. No. 416, ch. 2, § 3, [1971] Ind. Acts 1915; IND. ANN. STAT. § 31-1403 (Supp. 1971).

the creditor will be prejudiced thereby.¹²⁸

Another area of the Trust Code which impliedly affects the rights of third persons is that which describes the beneficiary's interest in the trust estate as personal property, except when the trustee is required to distribute real property from the trust estate to the beneficiary.¹²⁹ A third person dealing with the beneficiary should have the right to rely on this classification of the beneficiary's interest in accepting assignments of it or in making claims against it. This is important, since the formalities required for transfer or asserting a lien depend upon whether the property interest is personal or real.¹³⁰

These provisions of the Code encompassing the rights of third persons with respect to the trustee and the trust estate are graphic examples of provisions with which terms of the trust may conflict. If only the rights of the trustee and the beneficiaries are involved, the trust terms should prevail. If, however, the rights of third persons are adversely affected or jeopardized, the Code provisions should control.

*Code Provisions Which Establish or Uphold the
Court's Jurisdiction and Supervision Over Trusts*

Numerous provisions of the Code deal with the court's supervision of trusts and related matters. These provisions can be categorized into seven general classifications: (1) jurisdiction and inherent equitable powers of the courts, including the right of appeal; (2) effect of judgments rendered by the courts; (3) control over the trustee, including the right to remove; (4) procedural matters, such as pleadings, venue and notice; (5) accounting by the trustee to the court (when required);

128. IND. CODE § 29-1-6-4 (1971); IND. ANN. STAT. § 6-604 (1953). Since the Trust Code applies to testamentary trusts, a question arises as to whether the Trust Code or the Probate Code applies should this situation arise with regard to a testamentary trust. The distinction between the two provisions is that the Probate Code expressly provides that creditors of the beneficiary may object to the renunciation. Cf. UNIFORM PROBATE CODE § 2-801 (no provision for creditors to object).

129. Pub. L. No. 416, ch. 2, § 7(c), [1971] Ind. Acts 1916; IND. ANN. STAT. § 31-1407(c) (Supp. 1971).

130. Compare IND. CODE § 32-1-2-4 (1971); IND. ANN. STAT. § 56-103 (1961):

Conveyances of lands, or of any interest therein, shall be by deed in writing, subscribed, sealed and duly acknowledged by the grantor. . . .

with IND. CODE § 26-1-1-206 (1971); IND. ANN. STAT. § 19-1-1206 (1964):

[A] contract for the sale of personal property is not enforceable . . . beyond five thousand dollars . . . unless there is some writing . . . signed by the party against whom enforcement is sought or by his authorized agent.

Compare IND. CODE § 34-1-45-2 (1971); IND. ANN. STAT. § 2-2706 (1968) (judgment lien on real estate) with IND. CODE § 34-1-34-9 (1971); IND. ANN. STAT. § 2-3316 (1968) (judgment lien on chattels). See also IND. CODE § 34-1-45-1 (1971); IND. ANN. STAT. § 2-3613 (1968) (beneficiaries' interest in real estate held in trust subject to judgment lien).

(6) bonding of the trustee (when required) and (7) powers of the court when the trust instrument fails to provide otherwise. Although there are different reasons in each of these classifications for holding that the Code prevails in the event of conflict with the terms of the trust, one basic reason applicable to all classifications is that the court has inherent jurisdiction to supervise trusts.¹³¹ Under the Code, a trust is not subject to continuing supervision by the court unless the trust instrument so provides,¹³² but the court still has jurisdiction in the event of disputes, problems or other matters arising under the terms of the trust. The distinction drawn is between continuing jurisdiction as it relates to administrative accounting by the trustee and the general jurisdiction of the courts to resolve problems arising in the creation and administration of express trusts.

The first classification encompasses those provisions dealing with the jurisdiction and powers of the court. Except as otherwise provided therein, the Code is not to be construed to limit the general equity powers of the court over the administration of trusts.¹³³ Powers accorded to the courts by the Code include the power to terminate the trust if its purposes are either fulfilled or become illegal¹³⁴ and the power to rescind or reform the trust for the same grounds applicable to nontrust transfers of property.¹³⁵ When the purposes of the trust are fulfilled or are impossible to fulfill, the trustee has nothing further to do except make a final distribution of the trust property. To prevent the court from terminating a trust under such circumstances would be tantamount to requiring the trustee to perform useless acts—a requirement contrary to one of the established maxims of equity.¹³⁶ Since a trustee cannot fulfill a trust that is, or has become, illegal, the court should have the power to terminate a trust for illegal purposes. As to the court's power of rescission

131. The general jurisdiction of chancery to enforce trusts obviously gives the court power to order a trustee to carry out an imperative power. . . .

An attempt by the settlor to prevent the court from exercising control over the trust would doubtless be void.

BOGERT, *supra* note 64, § 558; *Premier Steel Co. v. Yandes*, 139 Ind. 307, 38 N.E. 849 (1894); *Newlin v. Newlin*, 114 Ind. App. 574, 52 N.E.2d 503 (1944).

132. Pub. L. No. 416, ch. 6, § 2, [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1802 (Supp. 1971).

133. Pub. L. No. 416, ch. 3, § 30, [1971] Ind. Acts 1934; IND. ANN. STAT. § 31-1530 (Supp. 1971).

134. Pub. L. No. 416, ch. 3, § 24, [1971] Ind. Acts 1932; IND. ANN. STAT. § 31-1524 (Supp. 1971).

135. Pub. L. No. 416, ch. 3, § 25, [1971] Ind. Acts 1932; IND. ANN. STAT. § 31-1525 (Supp. 1971).

136. "There is a maxim that courts of equity will not do or require the doing of a vain or useless thing. . . ." *Cantwell v. Cantwell*, 237 Ind. 168, 178, 143 N.E.2d 275, 280 (1957), *appeal dismissed & cert. denied*, 356 U.S. 225 (1958).

or reformation, the trust itself may be set aside or amended when grounds exist for such remedies. The court has these equitable powers notwithstanding contrary terms of the trust in situations in which it is necessary to protect against fraud, duress, undue influence or mistake.¹³⁷

The right to appeal any decision of a court having jurisdiction of proceedings is provided in the Code¹³⁸ and is as fundamental as the right of an interested party to bring an action in the first instance. The trust by its terms could not prevent such appeal.

In a different realm of basic judicial powers, the Code provides that the court may for reasonable cause order a trustee to disclose to any person information concerning the trust and the beneficiaries.¹³⁹ Although one of the objectives of the Code is to preserve the confidentiality of trust matters,¹⁴⁰ the trust should not be used as a device to conceal matters when, in the opinion of the court, good cause is shown warranting disclosure. In the case of a trust in which there is real estate either in violation of a building code or the subject of a transaction with the state or political subdivision thereof, the court must order disclosure of the identity of the beneficiaries.¹⁴¹ It is apparent that this provision of the Code is to prevent the use of a trust to conceal the identity of the beneficiaries when violations of law or conflicts of interest may exist with respect to trust real estate. In the case of building code violations, concealment becomes more tempting as stricter enforcement of building codes results in criminal and increased civil liabilities for landlords.¹⁴²

137. IV SCOTT, *supra* note 9, § 333. See *Colbo V. Buyer*, 235 Ind. 518, 134 N.E.2d 45 (1956).

138. Pub. L. No. 416, ch. 6, § 11, [1971] Ind. Acts 1954; IND. ANN. STAT. § 31-1811 (Supp. 1971).

139. Pub. L. No. 416, ch. 4, § 4(a), [1971] Ind. Acts 1935; IND. ANN. STAT. § 31-1604(a) (Supp. 1971).

140. See *Ard*, *supra* note 1, at 440.

141. Pub. L. No. 416, ch. 4, § 4(b), [1971] Ind. Acts 1936; IND. ANN. STAT. § 31-1604(b) (Supp. 1971).

142. Certain of the banks named as defendants in their capacity as trustees under land trust agreements have moved to dismiss or for summary judgment on the ground that they hold only legal title to the properties in question and have no authority to deal with the properties beyond their limited responsibilities as trustees. . . .

Moreover, although the banks claim that they are not the real parties in interest and could not, therefore, participate in the unlawful activity alleged, the banks in many instances are the only identified sellers since they executed the contracts as sellers, and the buyers have no way to identify the real parties whom the banks assert have complete management and control over the trust properties.

Contract Buyers League v. F & F Inv., 300 F. Supp. 210, 229 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (1970), *cert. denied*, 400 U.S. 821 (1970); see also *Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies*,

The second classification encompasses the effect of judgments by the court and includes several Code provisions. One such provision states that the court's judgment on an accounting is final, conclusive and binding upon all parties to the action who are subject to the jurisdiction of the court.¹⁴³ This provision restates prior statutory provisions.¹⁴⁴ It is well established that a judgment is final and binding on those properly before the court having jurisdiction over the person and the subject matter.¹⁴⁵ The Code also provides that any adjudication involving the interests of persons represented by a personal representative shall be lawful and binding on all persons, whether notified or not, who are of the same class as the person so represented.¹⁴⁶ This provision is the same as that already in the Probate Code, and, as noted there, the provision is based on the equitable doctrines of class actions and virtual representation.¹⁴⁷ If trust terms prevail in the event of conflict with either of these provisions, there could be an endless series of claims and suits with respect to accountings and claims against the trustee. To permit such multiplicity is certainly contrary to established public policy.

The third classification encompasses the court's powers over the trustee. The Trust Code provides that the court may remove a trustee; the comments give minimal guidelines for removal.¹⁴⁸ It is well estab-

66 COLUM. L. REV. 1254 (1966); Sax & Hiestand, *Slumlording as a Tort*, 65 MICH. L. REV. 869 (1967).

143. Pub. L. No. 416, ch. 5, § 15, [1971] Ind. Acts 1947; IND. ANN. STAT. § 31-1715 (Supp. 1971).

144. IND. CODE §§ 30-2-1-7, -10 (1971); IND. ANN. STAT. §§ 31-707, -10 (1969) (repealed 1971); cf. UNIFORM TRUSTEES ACCOUNTING ACT § 11.

145. See A. VESTAL, RES JUDICIA/PRECLUSION chs. 1, 18 (1969).

146. Pub. L. No. 416, ch. 6, § 10, [1971] Ind. Acts 1954; Ind. Ann. Stat. § 31-1810 (Supp. 1971).

147. Its purpose is to enable the court to make a final decree against absentees and incompetent persons, settling forever their property rights in estate matters where their rights are in a class with others having the same rights and are represented in the matter. Their interest, of course, must be the same as a party having a predominant interest. It does not however restrict the doctrine of class suits and virtual representation, solely to the situation covered by this section.

Comment to IND. CODE § 29-1-1-20(d) (1971); IND. ANN. STAT. § 6-120(d) (1953).

148. This subsection follows RESTATEMENT (SECOND) TRUSTS § 107 (1959). Reasons given in the Restatement for removing a trustee include incapacity, a serious breach of trust, refusal to give bond as required, refusal to account, commission of a crime, general unfitness, inattention to matters of administration, partiality between beneficiaries, or unreasonable refusal to cooperate with the co-trustees.

Comment to Pub. L. No. 416, ch. 3, § 29(a), [1971] Ind. Acts 1934; IND. ANN. STAT. § 31-1529(a) (Supp. 1971); cf. IND. CODE § 30-1-9-12 (1971); IND. ANN. STAT. § 56-619 (1961) (repealed 1971):

Trustees having violated or attempted to violate any express trust, or becoming insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause in the discretion of a court having

lished that good cause must be shown and that the court cannot act arbitrarily.¹⁴⁹ Even without statutory authority and irrespective of the trust it has been held that a court has the power to remove a trustee for cause.¹⁵⁰ The trust may provide for a lesser degree of care by the trustee in the administration of the trust than would be required without such provision,¹⁵¹ but the trust terms cannot entirely prevent the court from exercising its power of removal.¹⁵²

The same rationale can be applied to the Code provision which authorizes the court for good cause to appoint a temporary trustee.¹⁵³ Such authority is essential if there is to be a trustee to administer the trust in the event of the incapacity or death of a trustee, before a successor can be appointed.¹⁵⁴ This power is supplemental to the court's power to remove a trustee since it could be invoked pending an action for removal.

jurisdiction, may, on petition of any person interested, after hearing, be removed by such court, and all vacancies in express trusteeships may be filled by such court.

149. See *Rooker v. Fidelity Trust Co.*, 202 Ind. 641, 177 N.E. 454 (1931); *Ex parte Kilgore*, 120 Ind. 94, 22 N.E. 104 (1889); *Wilson v. Edmonds*, 78 Ind. App. 501, 136 N.E. 48 (1922).

A court which has supervision over the administration of trusts has power to remove a trustee for proper cause. Unless the grounds for removal are stated in a statute, and unless the grounds so stated are exclusive, the matter is one for the exercise of a sound discretion by the court. If the court of first instance orders the removal of a trustee without sufficient reason, or refuses to remove a trustee when grounds for removal are such that the refusal to remove him is an abuse of discretion by the court, the appellate court will reverse its action. The question in each case is whether the circumstances are such that the continuance of the trustee in office would be detrimental to the trust. Certain circumstances are clearly and necessarily a ground for removal; others may or may not be, depending on the whole situation.

II SCOTT, *supra* note 9, § 107 at 840-41 (footnotes omitted).

150. *Mazelin v. Rouyer*, 8 Ind. App. 27, 35 N.E. 303 (1893).

151. The trust instrument may contain a clause purporting to free the trustee from liability for certain described types of conduct or to limit his responsibility to the maintenance of certain standards. Thus, an attempt may be made to excuse him from liability for acts done in good faith but under a mistake; or the document may state that he shall be liable only for breaches of trust intentionally committed by him. These clauses are called immunity or exculpatory clauses, because they relieve the trustee from duties and liabilities which would otherwise rest upon him.

BOGERT *supra* note 64, § 542, at 458-59.

152. *Id.*, § 519, at 327.

153. Pub. L. No. 416, ch. 4, § 29(d) [1971] Ind. Acts 1934; IND. ANN. STAT. § 31-1529(d) (Supp. 1971).

154. IND. CODE § 30-1-9-10 (1971); IND. ANN. STAT. § 56-617 (1961) (repealed 1971) provided that on the death of a sole trustee of an express trust, the trust vested in the court having jurisdiction thereof and that such court should forthwith appoint a successor trustee. Without this provision, the title to the trust property probably vests in the trustee's executor or administrator until a successor or temporary trustee is appointed. See *Silvers v. Canary*, 114 Ind. 129, 16 N.E. 166 (1888).

The power of the court to appoint a successor trustee is also provided in the Code.¹⁵⁵ It can be exercised in situations in which the trust does not provide for a method of appointing a successor. When it is evident that it was the intent of the settlor to create a trust irrespective of the identity of the trustee, the trust will not fail for want of a trustee.¹⁵⁶ In order to preserve the trust, the court must, therefore, have power to appoint a trustee regardless of the trust's terms, which might provide, for example, that the court is to have no control or jurisdiction over the trust. If it is clear, however, from the terms of the trust that the settlor intended that only the named trustee could act, the trust will fail if that trustee dies, resigns or refuses to serve.¹⁵⁷

In this same classification of control over the trustee, the Code provides which facts are to be considered by a court in determining whether a defaulting trustee should be allowed any fee or a reduced fee.¹⁵⁸ As noted previously, this discretionary power of the court over the fees of a trustee is essential if the trustee's duty of loyalty is to be enforced effectively.¹⁵⁹ The relevant facts are a matter for the court to determine in its discretion. The terms of the trust form merely a part of the overall consideration and are not controlling, since these terms should not be able to direct the court as to how and for what reasons it should exercise its discretion.

The fourth classification embodies those Code provisions which set forth the procedures to be followed when the court's jurisdiction is invoked. Among these procedural matters is the general provision that, except as otherwise provided in the Code, the Indiana Rules of Procedure

155. Pub. L. No. 416, ch. 4, § 29(c), [1971] Ind. Acts 1934; IND. ANN. STAT. § 31-1529(c) (Supp. 1971).

156. *Rice v. Fletcher Sav. & Trust Co.*, 215 Ind. 698, 22 N.E.2d 809 (1939); II SCOTT, *supra* note 64, § 101.

157. The reason why a trust does not fail for want of a trustee is that to permit it to fail for this reason would be contrary to the intention of the settlor in creating the trust. The settlor is primarily interested in the disposition of the beneficial interest in the property, and the matter of its administration is a subsidiary consideration. . . . There are, however, rare cases in which it appears that the settlor intended the trust to continue only so long as the person designated by him as trustee should continue as trustee. It may be expressly so provided by the terms of the trust, or it may appear that the purposes of the trust cannot be carried out unless the person named by the settlor as trustee continues to act. In such a case the trust will fail if the trustee dies or resigns or is removed or otherwise ceases to be trustee.

Id., § 101.1, at 819-20; see *Hadley v. Hadley*, 147 Ind. 423, 46 N.E. 823 (1897).

158. Pub. L. No. 416, ch. 5, § 17(b), [1971] Ind. Acts 1947; IND. ANN. STAT. § 31-1717(b) (Supp. 1971).

159. See note 63 *supra* & text accompanying.

apply.¹⁶⁰ Other provisions of the Code cover special matters, including the form of pleadings to initiate an action,¹⁶¹ persons to whom and manner in which notice must be given,¹⁶² conditions under which a copy of the trust instrument must be filed as part of the proceedings,¹⁶³ extent of the right to change venue¹⁶⁴ and rules covering responsive pleadings when a verified statement of accounts is filed with the court.¹⁶⁵ The rules of procedure governing the court's handling of cases presented and the subject matter of the controversy (whether it is a trust, a contract or a similar instrument) cannot be directed by the instrument's terms. This power of rule making is inherent either in the courts or in the legislative branch.¹⁶⁶

Closely related to the procedural provisions of the Code are the provisions in the fifth classification which include the requirements for filing written statements of account with the court. If the settlor provides that the court is to have continuing jurisdiction to supervise the administration of the trust,¹⁶⁷ the trustee is required to file with the court a verified written statement of accounts¹⁶⁸ containing specified information.¹⁶⁹ If the settlor voluntarily invokes such continuing jurisdiction, he should not be able to curtail or limit the effectiveness of the court's supervision by providing that the trustee need not account to the court or need not furnish the information required by the Code.¹⁷⁰

160. Pub. L. No. 416, ch. 6, § 13, [1971] Ind. Acts 1955; IND. ANN. STAT. § 31-1813 (Supp. 1971).

161. Pub. L. No. 416, ch. 6, § 5, [1971] Ind. Acts 1952; IND. ANN. STAT. § 31-1805 (Supp. 1971).

162. Pub. L. No. 416, ch. 6, § 6, [1971] Ind. Acts 1952; IND. ANN. STAT. § 31-1806 (Supp. 1971).

163. Pub. L. No. 416, ch. 6, § 7, [1971] Ind. Acts 1953; IND. ANN. STAT. § 31-1807 (Supp. 1971).

164. Pub. L. No. 416, ch. 6, § 3(c), [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1803(c) (Supp. 1971).

165. Pub. L. No. 416, ch. 5, §§ 14(b)-(d), [1971] Ind. Acts 1946-47; IND. ANN. STAT. §§ 31-1714(b)-(d) (Supp. 1971).

166. In Indiana, the rule making power has been regarded as neither exclusively judicial nor exclusively legislative. In the event of conflict, the rules promulgated by the court prevail. IND. CODE § 34-5-2-1 (1971); IND. ANN. STAT. § 2-4718 (1968); Note, *The Court v. The Legislature: Rule Making Power in Indiana*, 36 IND. L.J. 87 (1960).

167. Pub. L. No. 416, ch. 6, § 2, [1971] Ind. Acts 1951; IND. ANN. STAT. § 31-1802 (Supp. 1971).

168. Pub. L. No. 416, ch. 5, § 12(d), [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1712(d) (Supp. 1971).

169. Pub. L. No. 416, ch. 5, § 13, [1971] Ind. Acts 1945; IND. ANN. STAT. § 31-1713 (Supp. 1971).

170. *Ackerman v. Fichter*, 179 Ind. 392, 101 N.E. 493 (1912), involved a testamentary trust for benevolent purposes. Although the settlor had dispensed with the requirement of accounting, the court held that the trust terms would have to

To permit otherwise would be to thrust the burden and responsibility of continuous supervision on the court but to withhold the information necessary for effective supervision.

The sixth classification encompasses provisions of the Code by which the trustee may be required by the court to provide a bond to secure his performance. Unless the trust provides otherwise, no bond need be provided by a trustee.¹⁷¹ If, however, the court has continuing supervision of the trust, the court may, *sua sponte*, require the trustee to furnish bond.¹⁷² Inasmuch as the Code provides that only the settlor may direct that the administration of the trust be under the continuing supervision of the court, it would seem strange if, in the same instrument, he could delete the court's statutory option to require a bond. To prevent the court from exercising its option would detract from the court's power to supervise the trust effectively. As *Ex parte Kilgore*,¹⁷³ the leading Indiana case in the area, states :

If [the testator] appoints a trustee and vests him with power to execute the trust without the aid or appointment of the court, his express directions exempting the trustee from giving bond can not be disregarded. . . .

. . . . If, however, it be the clearly expressed purpose of the author of the trust that the trustee should not be required to execute a bond, it is not within the power of the court to set aside an unequivocal provision. . . , except its aid or jurisdiction is invoked in the course of a matter or proceeding in which the statute requires the filing of a bond.¹⁷⁴

Under the rationale of *Kilgore*, when the aid of the court is invoked in the administration of the trust, the court can require a bond irrespective of the terms of the trust. This is analogous to the supervising court's power to require written statements of account to be filed with the court. The court's ability to require bond does not render meaningless the provision dispensing with bond unless the trust provides otherwise. That provision still enables a trustee to qualify and serve without bond as trustee of a court-supervised trust unless the court exercises its option.

"give way to the statute" requiring accounting. See also BOGERT, *supra* note 64, § 973, at 249-50.

171. Pub. L. No. 416, ch. 6, § 8(a), [1971] Ind. Acts 1953; IND. ANN. STAT. § 31-1808(a) (Supp. 1971).

172. Pub. L. No. 416, ch. 6, § 8(b), [1971] Ind. Acts 1953; IND. ANN. STAT. § 31-1808(b) (Supp. 1971); cf. IND. CODE §§ 28-2-7-1, 2 (1971); IND. ANN. STAT. §§ 18-1114, 1115 (1964).

173. 120 Ind. 94, 22 N.E. 104 (1889).

174. *Id.* at 96-97, 22 N.E. at 105.

Even if the trust is not under a court's continuing supervision, the court may, upon petition by an interested party, direct the trustee to provide a bond if it seems necessary to the court to protect the interest of any beneficiary.¹⁷⁵ This seems to emanate from the court's inherent jurisdiction,¹⁷⁶ now embodied in statute,¹⁷⁷ to determine matters and resolve disputes involving trusts. This power of the court assures protection of the beneficiary's interest in the trust. To permit a trust to provide otherwise could jeopardize the trust estate in situations, among others, in which the solvency of the trustee is questionable.

If bond is required, the court determines the amount, term and surety unless otherwise specified.¹⁷⁸ This provision supplements the Code provisions permitting the court to require bond of a trustee. Also supplemental to these provisions is the Code section concerning procedural and substantive matters when suit is brought to collect on the bond.¹⁷⁹ Again, this provision is necessary in order to protect the trust property and the interests of the beneficiaries.

The seventh classification includes provisions which authorize the court to act in relation to the trust except when the trust, either directly or indirectly, provides otherwise. Although these Code provisions are not prefaced by the clause, "unless the terms of the trust provide otherwise," they are not applicable unless the trust contains certain terms or unless certain extrinsic factors are present. For example, the Code provides that the court may modify the terms of the trust to give the settlor the power to revoke or modify the trust, if he intended to reserve the power, believed that he had reserved it and the power was omitted by mistake.¹⁸⁰ This provision would only be pertinent if the settlor said nothing in the trust concerning his right to revoke. If the settlor also met the extrinsic requirements of intent, belief and mistake, the court could modify the trust to provide a right to revoke regardless of conflicting trust terms. Conflicting terms exist if the trust provides that the court has no right to modify its terms. The settlor who fully intended to reserve

175. Pub. L. No. 416, ch. 6, § 8(c), [1971] Ind. Acts 1953; IND. ANN. STAT. § 31-1808(c) (Supp. 1971).

176. *Ex parte Kilgore*, 120 Ind. 94, 22 N.E. 104 (1889); *accord*, *State ex rel. Dair v. Roudebush*, 114 Ind. 347, 16 N.E. 636 (1888).

177. Pub. L. No. 416, ch. 3, § 30, ch. 6, § 1, [1971] Ind. Acts 1934, 1951; IND. ANN. STAT. § 31-1530, -1801 (Supp. 1971).

178. Pub. L. No. 416, ch. 6, § 8(e), [1971] Ind. Acts 1953; IND. ANN. STAT. § 31-1808(e) (Supp. 1971).

179. Pub. L. No. 416, ch. 6, § 9, [1971] Ind. Acts 1954; IND. ANN. STAT. § 31-1809 (Supp. 1971).

180. Pub. L. No. 416, ch. 3, § 28, [1971] Ind. Acts 1933; IND. ANN. STAT. § 31-1528 (Supp. 1971).

the power to revoke would be stymied by the terms of the trust unless the Code provisions prevail.¹⁸¹

A similar provision in the Code is that which permits the court to authorize the trustee to deviate from the terms of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the purposes of the trust.¹⁸² The trust, for example, could provide for limitations on the types of investments. This would not result in a conflict with the Code provision. If the trust, however, provided that the trustee was not to deviate, whatever the changed conditions, the conflict would exist. Under these circumstances, if the beneficial purpose of the trust is not to be defeated or substantially impaired, the Code provision authorizing deviation should prevail. This result is in keeping with case law prior to the Code.¹⁸³

The long established doctrine of *cy pres* has been codified in the Trust Code.¹⁸⁴ This provision applies only when the settlor has manifested a general charitable intent and the specific charitable purpose expressed in the trust becomes impossible, impractical or illegal. The effect of the *cy pres* provision differs from the provision permitting a court to authorize deviation in that *cy pres* affects the purpose of the trust while deviation affects administration of the trust.¹⁸⁵ Conflict between the *cy pres* provision in the Code and the terms of the trust is not possible. If the general charitable intent is not expressed or if the settlor makes it clear that the trust shall fail if the specific charitable purpose cannot be carried out, the trust fails, and the *cy pres* provision is not applicable to save it.

The forgoing seven areas encompass the aspects of the court's jurisdiction and powers over the administration of trusts which are within the scope of the Code. In some instances the jurisdiction or power is invoked in a proceeding brought by an adverse party. In others the trustee may be the moving party and in still others the court may take action

181. See *Colbo v. Buyer*, 235 Ind. 518, 134 N.E.2d 45 (1956); cf. *Lederman v. Lisinsky*, 112 N.Y.S.2d 203 (Sup. Ct. 1952).

182. Pub. L. No. 416, ch. 3, § 26, [1971] Ind. Acts 1932; IND. ANN. STAT. § 31-1526 (Supp. 1971).

183. *Foust v. William E. English Foundation*, 118 Ind. App. 484, 80 N.E.2d 303 (1948). II SCOTT, *supra* note 9, § 167, at 1270; 24 IND. L.J. 464 (1949).

184. Pub. L. No. 416, ch. 3 § 27, [1971] Ind. Acts 1933; IND. ANN. STAT. § 31-1527 (Supp. 1971); see *Quinn v. Peoples Trust & Sav. Co.*, 223 Ind. 317, 60 N.E.2d 281 (1944).

That doctrine [equitable deviation] is frequently confused with another equitable doctrine, *cy pres*, by which courts under somewhat similar circumstances justify departure from directions contained in trust instruments. 24 IND. L. J. 464, 465 (1949).

185. IV SCOTT, *supra* note 9, § 399, at 3086; 24 IND. L.J. 464, 465 (1949).

on its own motion. In some situations the jurisdiction arises by the terms of the trust itself. In any event, once jurisdiction is invoked, the powers of the court as provided in the Code should prevail in the event of conflict with the terms of the trust.

CODE PROVISIONS OVER WHICH TERMS OF THE TRUST
SHOULD PREVAIL IN THE EVENT OF CONFLICT

As a result of the analysis pursued in this article, provisions of the Code have been identified which should prevail in the event of conflict with terms of a trust. The remaining provisions of the Code should yield to the terms of the trust in the event of conflict. As noted previously, this is based on the policy expressed in chapter 1, § 3 of the Code to the effect that the terms of the trust control unless the rules of law clearly prohibit or restrict them. A few observations will suffice to identify areas in which the terms of the trust should prevail.

Trust terms which set forth the duties and liabilities of the trustee involve areas upon which the settlor and trustee should be permitted to agree in the case of an inter vivos trust and which the settlor should be able to control in the case of a testamentary trust. So long as these terms do not conflict with Code provisions heretofore identified as necessary for the preservation of the trust for the settlor's purposes, these trust terms should prevail. For example, one Code provision states that the duties of the trustee may not be enlarged without the consent of the trustee.¹⁸⁶ Although it is difficult to conceive of a trustee agreeing to a trust, the instrument could provide otherwise. Only the consenting trustee would be affected. For another example, the settlor and trustee should be permitted to determine the ultimate liability for injury suffered by a third party irrespective of Code provisions.¹⁸⁷ Still another example arises when the trust provides that the trustee be discharged within a specified time from liability on all matters set forth in the account furnished to beneficiaries. The trust could provide that such discharge be in a manner other than by a writing signed by the beneficiary.¹⁸⁸

One provision of the Code which appears at first glance to be one over which the terms of the trust should not prevail is that establishing a special statute of limitations of three years applicable to claims against

186. Pub. L. No. 416, ch. 3, § 1(c), [1971] Ind. Acts 1918; IND. ANN. STAT. § 31-1501(c) (Supp. 1971).

187. Pub. L. No. 416, ch. 3, § 10(b) [1971] Ind. Acts 1925; IND. ANN. STAT. § 31-1510(b) (Supp. 1971).

188. Pub. L. No. 416, ch. 5, § 14(a), [1971] Ind. Acts 1946; IND. ANN. STAT. § 31-1714(a) (Supp. 1971).

a trustee on his final account.¹⁸⁹ A trust could provide either a longer or shorter period, and a conflict with the Code would exist. If the shorter period is reasonable, there is ample precedent in contract cases for upholding the shorter period, absent a statute voiding such contract provisions.¹⁹⁰ With respect to extending the period within which to assert claims, it is far from clear whether the extension would be upheld by the courts.¹⁹¹ The theory of waiver of the statutory limitation by the terms of the trust is somewhat tenuous, since waiver is generally required of the party in whom the cause of action resides—*i.e.*, in the case of a trust, the beneficiary who is not a signatory of the trust. Few cases deal with trust situations, although analogous situations are presented in claims by beneficiaries of life insurance policies.¹⁹² It is beyond the scope of this article to discuss this problem in the detail and depth required.

With respect to the terms of the trust which control the disposition of trust property, the settlor's intent should prevail. For example, if a beneficiary disclaims, the settlors should be able to designate who takes the property rather than having the trust property distributed pursuant to the Code.¹⁹³

The foregoing are a few examples of Code provisions over which the terms of the trust should prevail in the case of conflict. As noted throughout, the result in the case of a conflict may well be determined on the basis of whose interest is to be protected—the settlor, the trustee, the beneficiaries, the public or third parties.

CONCLUSION

While an attempt has been made to identify provisions of the Code which will prevail in the event of conflict with terms of the trust, the more important purpose of this article is to suggest guidelines and criteria both for making judgments when such conflict occurs and for making decisions in the drafting of trusts. It does not seem likely that many

189. Pub. L. No. 416, ch. 6, § 12, [1971] Ind. Acts 1955; IND. ANN. STAT. § 31-1812 (Supp. 1971).

190. *Hooser v. Baltimore & O.R.R.*, 177 F. Supp. 186 (S.D. Ind. 1959); *see* Annot., 6 A.L.R.3d 1197 (1966).

191. *National Sur. Co. v. American Cement Tile Mfg. Co.*, 226 Ala. 373, 147 So. 158 (1933); *Wright v. Gardner*, 98 Ky. 454, 33 S.W. 622 (1895). The period prescribed by statute in both cases was deemed a matter of public policy, and terms of the contract enlarging the period were void.

192. *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947); *Caywood v. The Supreme Lodge, Knights & Ladies of Honor*, 171 Ind. 410, 86 N.E. 482 (1908).

193. Pub. L. No. 416, ch. 2, § 4, [1971] Ind. Acts 1915; IND. ANN. STAT. § 31-1404 (Supp. 1971).

conflicts will arise, since the Code codifies many trust practices and procedures which practicing lawyers and trust officers have been following for years. It is, however, the isolated instance of conflict which can cause an embarrassing situation for the unwary draftsman.

The Indiana Trust Code is landmark legislation in the field of trust law. Other states contemplating enactment of a comprehensive trust code should look to the Indiana Code, as well as to the less comprehensive codes in Texas¹⁹⁴ and Louisiana.¹⁹⁵ It should be born in mind that practicing lawyers and trust officers were instrumental in the drafting of the Code. The emphasis was on a workable code for day-to-day trust practice.

With respect to the general provision of the Code which is the subject of this article, Indiana could have been more precise. Since the purpose of any codification is to make the law more readily ascertainable and certain in its application, this provision of the Trust Code interjects an uncertainty which is not warranted. It appears that the impact of this provision on the other provisions of the Code was not fully recognized when it was inserted in the Code as a general "catch-all" provision. Perhaps one of the first amendments to the Code should eliminate much of this uncertainty. Admittedly this would render the Code less flexible, but the uncertainty engendered by this provision seems too exorbitant a price to pay for flexibility. When the first disputes arise this will become readily apparent. Amendments could identify specific provisions of the Code or at least amplify what is meant by "the rules of law" which "clearly prohibit or restrict the article which the terms of the trust purport to authorize."

194. TEX. REV. CIV. STAT. art. 7425b-1 *et seq.* (1960).

195. LA. REV. STAT. § 9:1721 *et seq.* (1965).